

ISSUE PAPER

Lower Willamette River Environmental Dredging, OR
General Investigation (GI) Feasibility Study (FS); CWIS Number: 013627

BLUF: The Corps could use its Section 312(b) contaminated sediment removal and remediation authority in the National Priorities List site within the Lower Willamette River to supplement EPA's authority in order to address orphan, unallocable, and United States contamination. Such use of the 312(b) authority would be conditioned on EPA concurrence in the joint plan, appropriate shielding of the Corps from liability, and that rights and responsibilities under CERCLA are otherwise not affected.

BACKGROUND

Section 312(b) was added to the Water Resources Development Act (WRDA) in 1990. 33 U.S.C. § 1272(b). Section 312(b) authorizes the Corps to remove and remediate contaminated sediment for environmental enhancement and water quality improvement under a joint plan developed by interested federal, state and local public officials so long as the local sponsor contributes at least 35% of the project costs and the activity does not affect the rights and responsibilities of potentially responsible parties under the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9601 et seq., ("CERCLA"). In 1999, Section 224 of WRDA listed the Willamette River as a priority site for application of Section 312. 33 U.S.C. § 1272(f). At the same time, the 1999 House Transportation and Infrastructure Committee explained that Section 312 created a partnership with the expectation that the Corps' authority would supplement EPA CERCLA actions such that the Corps' should proceed with such work when regulatory agencies concur that such work does not "provide relief to a private party or government entity which would otherwise be legally responsible for the remediation."¹ This was interpreted in the Ashtabula River Section 312 Project to mean that a Section 312(b) project with federal funding up to 65% may be used to pay for the remediation of contaminated sediments impacted by orphan, unallocable and United States sources.²

The Corps initiated its Section 905(b) Reconnaissance Study for the Lower Willamette River (LWR) project in 1999. The Port of Portland was the initial local sponsor. The final report issued in December 2000 concluded that there was a federal interest in developing a comprehensive plan for restoring the ecosystem in the Lower Willamette River by remediating contaminated sediments ("LWR GI Study"). At the same time, EPA completed its initial study of areas of the Lower Willamette River and listed the Portland Harbor Superfund Site on the National Priorities List ("NPL"). In 2001, the Port, City of Portland and other parties entered into a consent order with EPA ("EPA Consent Order") to study the Portland Harbor contamination under CERCLA. The EPA Consent Order acknowledges "the River ha[s] served as a major industrial water corridor for more than a century" and that "[i]ndustrial use of the ... River has been extensive."³ The EPA Consent Order also acknowledges the potential remediation of contaminated sediments through a Section 312(b) project and supports

¹ 1999 House Transportation and Infrastructure Committee Report p 160, <http://www.gpo.gov/fdsys/pkg/CRPT-106hrpt106/pdf/CRPT-106hrpt106-pt1.pdf>.

² 2001 Ashtabula River Partnership Comprehensive Master Plan for the Ashtabula River.

³ 2001 Administrative Order on Consent (AOC) for RI/FS in Portland Harbor p. 8.

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coordination of the environmental dredging project with the CERCLA project provided that the parties could develop a plan to integrate Section 312 into the EPA studies.⁴ Also in 2001, the Corps issued policy guidance on implementing Section 312 in contamination sites (the “Corps Section 312 Implementation Guidance”).⁵ In 2002, EPA, the Corps, and the Oregon Department of Environmental Quality entered into a Letter of Agreement providing for collaboration on Portland Harbor matters including the potential use of the Section 312 authority in the Portland Harbor.⁶ Also in 2002, a Congressional Resolution was passed expanding the Corps’ LWR GI Study to include aquatic ecosystem restoration.⁷ During the subsequent LWR GI Feasibility Study, the local sponsors (Port of Portland and City of Portland) identified three candidate sites in the Portland Harbor Superfund Site for use of the Corps’ Section 312(b) authority. The three sites were identified based on the potential for substantial orphan, unallocable, and potential federal government derived contamination. The sites were:

- (1) Willamette Cove. The historical location of many defunct wood products industries and the former Port of Portland St. Johns Dry Docks (1903-1953) where hundreds of United States and private vessels were outfitted and repaired from World War I through the Korean War by private contractors. Many of the ship repair contractors and vessel owners and operators connected to the dry docks are orphan parties. Willamette Cove is immediately downstream of and adjacent to the McCormick & Baxter wood treatment NPL site, a separate orphan Superfund Site located within the Portland Harbor Superfund Site.
- (2) Swan Island & Lagoon. The location of a World War II US Maritime Commission T2 Oil Tanker ship building and scrapping yard, and later a common use ship repair yard where ship repairers repaired or converted hundreds of United States and private vessels from 1945 to 1996, and of industrial manufacturing and transportation and distribution businesses whose properties drained to the Lagoon. Many of the ship repair contractors, vessel owners and operators and industrial businesses connected to Swan Island are orphan.
- (3) River Mile 11 East. The location of an historical ship building yard that between approximately 1904 and 1986 built a substantial number of United States sub chasers and landing craft and other area industries.⁸

These sites and their location in the Portland Harbor Superfund Site are depicted in Exhibit A. Orphan contamination is contamination derived from parties that are dissolved, bankrupt, or otherwise defunct such that they are unavailable to pay their fair share of CERCLA liability.

⁴ 2001 Administrative Order on Consent (AOC) for RI/FS in Portland Harbor, Statement of Work (SOW) p 8, http://www.epa.gov/region10/pdf/ph/sitewide/lwg_sow.pdf

⁵ 2001 Corps Memo CECW-P/CECW-O dated 25 April 2001, Subj: Implementation Guidance for Section 312 of WRDA, <http://planning.usace.army.mil/toolbox/library/WRDA/wrda99sec224.pdf>

⁶ 2002 Letter of Agreement Between USEPA Region 10, ODEQ, USACOE Portland District Concerning the Lower Willamette River dated 30 March 2002.

⁷ 2002 House Resolution Docket 2687, adopted June 26, 2002, by the U.S. House of Representative, Committee on Transportation and Infrastructure, <http://www.gpo.gov/fdsys/pkg/CREC-2002-07-09/html/CREC-2002-07-09-pt1-PgH4358-6.htm>

⁸Recent initiation of EPA enforcement action in the River Mile 11 East area against eight PRPs may result in this site falling out of the Section 312(b) project.

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Unallocable contamination is contamination from sources that are either not covered by CERCLA or, after investigation, remain non-attributable (i.e., a mystery). United States derived contamination is contamination potentially caused by federal actions. The candidate Section 312(b) sites were added to the aquatic ecosystem restoration sites identified in the LWR GI Study, so that the project contains a mix of aquatic ecosystem restoration and Section 312(b) sites.

Sediment at all three sites are also sites identified in the draft Portland Harbor Superfund Site RI/FS as requiring remediation under CERCLA. The sediment remedial action proposed under CERCLA could be executed under the Construction General ("CG") project should the policy approval sought by this Issue Paper occur and the associated legal obligations are met. The Willamette Cove project contemplates dredging and capping of contaminated sediments and riverbank restoration in the off-Navigation Channel impacted by historical ship repair and wood products industries. The Swan Island project contemplates dredging with capping or confined sediment disposal in the Swan Island Lagoon in an area impacted by historical ship yard activities and area industrial activities. The River Mile 11 East project contemplates dredging and capping in an area of historical contamination associated with the ship building yard and historical area industries.

The Section 312(b) sites are being evaluated consistent with the Corps Section 312 Implementation Guidance and the EPA Consent Order. The local sponsors are identifying potentially responsible parties connected to the sites, including identifying orphan and unallocable contamination and the federal government nexus. The Corps may be shielded from liability for the performance of Section 312(b) actions inside the NPL site by implementing a Section 312(b) joint plan under an agreement (likely a consent decree) with EPA, which: 1) recognizes the applicability of the CERCLA response action contractor defense, 42 U.S.C. § 9619(a), 2) releases the Corps from liability and provides for protection from contribution claims, 3) requires the remediation contractor to have environmental liability insurance, and 4) requires the local sponsors to backstop these protections with an indemnity of the Corps.

A SMART Planning charette was conducted on the project on November 1 and 2, 2012. The team decided that a series of issues papers would be prepared by the District to seek vertical alignment within the Corps on the use of the Section 312(b) authority inside the Portland Harbor NPL site.

STATEMENT OF ISSUE AND OTHER INFORMATION

Section 312(b) authorizes the Corps to remove or remediate contaminated sediment for environmental enhancement and water quality improvement under a joint plan developed by interested federal, state and local public officials in the Willamette River, a Section 312(f) priority river, subject to an at least 35% local sponsor cost share and by not affecting a party's rights and responsibilities under CERCLA. The Corps' Section 312 Implementation Guidance outlines how a Section 312 project should be undertaken. The question presented here for decision is: should the Corps exercise its existing Section 312(b) authority to supplement EPA's authority in the Portland Harbor NPL site to accomplish the cleanup of orphan, unallocable, federal and other contamination and thereby contribute to the resolution of potential federal

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liability in the NPL Site?

Without this project, remediation at these sites will likely be subject to prolonged litigation and cleanup may not occur for years. Federal responsibility will ultimately be resolved by the U.S. Department of Justice during the allocation process. With this project, remediation at the sites could occur under a CG project with potential for less delay caused by litigation. The federal share of the project would contribute to potential federal responsibility at the sites and in Portland Harbor, subject to the agreement of the U.S. Department of Justice and other potentially responsible parties (“PRPs”).

Should the Corps pursue this action, the following issues must be resolved:

- (1) The Corps must be appropriately shielded from liability in connection with the performance of a Section 312(b) removal and remediation project inside an NPL site.

The liability shield can be accomplished by the Corps entering into an agreement with EPA for implementation of the Section 312(b) joint plan that: 1) recognizes the applicability of the CERCLA response action contractor defense, 2) releases the Corps from liability and provides for protection from contribution claims, 3) requires environmental liability insurance covering the work, and 4) requires the local sponsors to indemnify the Corps. Section 119(a) of CERCLA shields response action contractors from CERCLA liability for the performance of cleanup actions in Superfund Sites. 42 U.S.C. § 9619(a). The Corps and the local sponsors are CERCLA “persons” that may enter into consent decrees with EPA governing cleanups. EPA has authority to enter into consent decrees, release a person from liability, acknowledge the applicability of CERCLA defenses, and furnish protection from contribution claims. 42 U.S.C. § 9622. Such agreements include environmental liability insurance covering the response action. And, subject to limitations on their legal authority, the local sponsors may provide the Corps with indemnity protection for a project. Therefore, subject to obtaining EPA’s concurrence, the Corps should be able to proceed with a Section 312(b) project in an NPL site without subjecting itself to any more CERCLA liability than it may have already, independent of a future contaminated sediment removal or remediation project. The approach contemplated for the Ashtabula River Section 312(b) project is a pertinent precedent.⁹

- (2) Implementation of the Section 312(b) projects under the Corps’ Section 312 Implementation Guidance would be structured so that it does not affect a party’s rights and responsibilities under CERCLA.

Allocation studies of the sites would be required to demonstrate that federal activity at the site has contributed to a significant portion of the site contamination, orphaned and unallocable contamination is present, or that the combination of those may be as much as 65% of the contamination present. Sponsors will agree to enter agreements with other responsible parties at the site to provide the local share of the project costs.

The long industrial history of the Willamette Cove and Swan Island sites dating to the World War I era means that there is potentially a substantial orphan and unallocable share of contamination to be addressed. In addition, the history of these sites as ship yards where hundreds of United

⁹ 2004 Ashtabula River and Harbor Final Comprehensive Management Plan (Feasibility Study) and Environmental Impact Statement, Summary Report and Addendum p. 33.

States vessels were built, outfitted, scrapped and repaired means that there may be a substantial federal nexus to the contamination. The project will include an evaluation of PRPs to demonstrate that contribution of up to 65% federal funding does not subsidize polluters. The evaluation will consider four categories of pollution sources:

- a. Orphan contamination sources, namely dissolved, bankrupt or otherwise defunct persons who likely contributed to the contamination problem;
- b. Unallocable contamination sources that cannot be reached under CERCLA cost recovery and contribution mechanisms (e.g., CERCLA exempt discharges of oil, mystery spills and releases, and releases by sovereign nations);
- c. Contamination sources potentially caused by federal actions, including the federal government as arranger of ship yard operations and of federally-owned vessels operated in the site or that arranged for disposal of hazardous substances; and
- d. Contaminant sources that remain viable.

To the extent that it is not readily apparent from the evaluation that the maximum 65% federal funding is appropriate at a site, the percentage of federal funding would be reduced, with the local sponsors and remaining viable parties contributing a correspondingly larger share. To the extent remaining viable polluters do not contribute their fair shares, the local sponsors would pursue recovery from such non-cooperating remaining viable PRPs. Implementation of the joint plan would be conditioned on the local sponsors' willingness to fund the appropriate local share. The Ashtabula River Section 312 project is precedent.¹⁰ The payment of PRPs' fair shares would be captured in a consent decree covering the project.

The Ashtabula River and Harbor project area, defined as areas of the river above and below the 5th Street Bridge in Ashtabula, Ohio, were primarily contaminated by unregulated discharges from the Fields Brook watershed.¹¹ The area would have become an operable unit of the Fields Brook NPL site, had not Section 312 been used to supplement EPA's authority arising over that Superfund Site. In 2002, the Corps approved a Section 312(b) project for the upper end of the Ashtabula River and Harbor (above the 5th Street Bridge) funded 65/35% and a Section 312(a) project for the section below the 5th Street Bridge adjacent to the federally-authorized navigation channel funded 100%.¹² Viable remaining PRPs committed to participate in funding the local sponsor cost share.¹³ The PRPs' payment of their fair shares was contemplated to be captured in a consent decree covering the project.¹⁴ In September 2004, the Assistant Secretary of the Army for Civil Works approved the project and sought the Office of Management and Budget's opinion on the budget.¹⁵ The Office of Management and Budget indicated that the project could proceed, but only based on a 50/50 funding cost share.¹⁶ In 2005, EPA's Great Lakes National Project Office indicated that the former Section 312(b) portion of the project would be funded under the Great Lakes Legacy Act (GLLA).¹⁷ Consequently, in 2006, the ASA(CW) approved the Section 312(a), noting that EPA would handle the Section 312(b) component under GLLA.

¹⁰ While the planning for the Ashtabula River cleanup initially proceeded to an approved project under the Section 312 authority, implementation of the project was performed under a new Great Lakes Legacy Act.

¹¹ 2001 Ashtabula River and Harbor Final Comprehensive Management Plan and Environmental Impact Statement p. iii.

¹² Id.; 2004 Ashtabula River and Harbor Final Comprehensive Management Plan (Feasibility Study) and Environmental Impact Statement, Summary Report and Addendum p. 22.

¹³ Id., Summary Report and Addendum pp. 26-27.

¹⁴ Id., Summary Report and Addendum p. 33.

¹⁵ Environmental Dredging Project, Project White Paper, Ashtabula River, March 14, 2006 p. 3.

¹⁶ Letter dated September 22, 2004 from John Paul Woodley (ASA(CW)) to John Bolton (Director OMB); Cite omb memo

¹⁷ Cite federal register announcement; 2004 Ashtabula River and Harbor Final Comprehensive Management Plan

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¹⁸ The Section 312(b) project in Portland Harbor will be consistent with the approach contemplated for the Ashtabula River.

- (3) Use of the Section 312 authority to supplement EPA's powers relating to the NPL site could assure accelerated, collaborative, and broader cleanup and restoration of these sites.

Currently, the EPA-supervised remedial investigation and feasibility study has been proceeding for almost 12 years. EPA's record of decision ("ROD") for the harbor-wide site, first forecast for 2004, is now currently being predicted to be issued at the earliest in 2015. No PRP has yet been identified for Willamette Cove or Swan Island Lagoon that is willing to implement the future remedy to be selected by EPA. The ongoing Portland Harbor mediated allocation process is still years from completion. The predicted large orphan share and potential federal nexus to these sites will complicate the process of determining who will take the lead on cleanups. The process is further complicated by the financial constraints on the remaining public and private entities connected to these sites, many of whom have had to settle with or sue their insurers to attempt to fund any activity associated with the NPL site.¹⁹ While EPA has an Orphan Share Funding Policy, the Superfund is depleted and no orphan share funding has been made available for many years.²⁰ In addition, cleanup of contamination by EPA will not address the degraded ecological condition of these sites stemming from years of anthropogenic activities.

On the other hand, subject to congressional appropriation, Section 312(b) may legitimately be used to supplement EPA's CERCLA authorities at sites when the project would not subsidize polluters.²¹ Per the Section 312 Implementation Guidance, "as a general matter, and consistent with budget priorities, use of the Section 312 authority will be encouraged since the Corps has the expertise to undertake such work and restoration of the Nation's waters is a priority mission area." Use of Section 312 appropriations could enable the accelerated cleanup and restoration of Willamette Cove, Swan Island Lagoon and River Mile 11 East. The project could be implemented through inter-governmental collaboration among the Corps, EPA and the local sponsors. Subject to EPA's concurrence in the joint plan, early design of cleanup and restoration remedies could be undertaken at these sites using Section 312(b) and EPA's parallel decision making authority under CERCLA, such as EPA's issuance of an Action Memorandum under the CERCLA removal action program or the issuance of a site-specific ROD before a harbor-wide ROD.²²

Cleanup and restoration of these areas of Portland Harbor could move forward collaboratively many years before it might otherwise through EPA's CERCLA authority, which includes issuing unilateral orders to force cleanup based on assertion of joint liability for contamination and prohibition of pre-enforcement review of EPA agency action, or performing a Superfund-financed cleanup.

DISTRICT RECOMMENDATION

(Feasibility Study) and Environmental Impact Statement, Summary Report and Addendum p. 10.

¹⁸ Memorandum for the Director of Civil Works, John Paul Woodley (ASA(CW), dated March 3, 2006.

¹⁹ See e.g., *The Marine Group v. Century Indemnity Company*, Case No. _____ (D. Or. ???).

²⁰ [fix based on actual facts and footnote sources – pending receipt of information].

²¹ 1999 House Transportation and Infrastructure Committee Report.

²² While issuance of a harbor-wide ROD gives EPA and the Corps the certainty and protection of a final remedy, complete remedies can also be selected through the issuance of a removal action memorandum, a site-specific ROD or an interim ROD that could be issued well before a harbor-wide ROD.

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Due to the reasons stated above, the District recommends approval to continue the LWR GI Feasibility Study of Willamette Cove and Swan Island sites within the Portland Harbor NPL Site under its existing Section 312(b) authority consistent with the Corps' Section 312 Implementation Guidance, subject to:

1. assuring the engagement of EPA on the joint plan;
2. obtaining reasonable protection for the Corps from CERCLA liability under CERCLA in connection with the performance of the joint plan in the NPL site; and
3. resolution satisfactory to the Corps and EPA, through identification of orphan, unallocable, United States and remaining viable contamination sources, that rights and responsibilities under CERCLA will not be affected.

